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Supreme Court, U.S.
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No. 92-993

In The

Supreme Court of the United States

October Term, 1992

In re:

ESTATE OF WILLARD S. McCUE, Deceased

JOHN McCUE,

Petitioner,

vs.

ESTATE OF WILLARD S. McCUE,
MARK McCUE, Personal Representative,

Respondent.

**On Petition For Writ Of Certiorari
To The Court Of Appeals
For The State Of Minnesota**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this court should review the constitutionality of a state statute where the outcome in the state court would be the same even if the statute were unconstitutional.

2. Whether this court should review a First Amendment claim where the Petitioner can demonstrate no harm, or threatened harm, from the claimed prior restraint.

3. Whether this court should review constitutional claims never raised, preserved, or passed upon in the state courts.

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STATUTES INVOLVED

1. Minn. Stat. § 524.2-502 states the following:

> Except as provided for writings within § 524.2-513 and wills within § 524.2-506, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by the testator's direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

2. Minn. Stat. § 524.3-406(b) states the following:

> (b) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

3. Minn. R. Civ. App. P. 136.01, Subd. 1(b), states the following:

> A statement of the decision without a written opinion shall not be officially published and shall not be cited as precedent, except as law of the case, res judicata or collateral estoppel.

4. Minn. Stat. § 480A.08, Subd. 3, states the following:

> Unpublished opinions of the Court of Appeals are not precedential. Unpublished opinions must not be cited unless the party citing the

unpublished opinion provides a full and correct copy to all other counsel at least 48 hours before its use in any pretrial conference, hearing, or trial. If cited in a brief or memorandum of law, a copy of the unpublished opinion must be provided to all other counsel at the time the brief or memorandum is served, and other counsel may respond.

STATEMENT OF THE CASE

Respondent adopts by reference Petitioner's statement of the case and adds the following:

The Last Will and Testament of Willard S. McCue was executed on April 10, 1986, and was attested to by two witnesses, Jane Schaefer, and Arlene Athmann, on that same day. The signatures of Willard McCue and the witnesses appear on Page 5 of the will (Respondents, Appendix, Page 9).

Page 6 of the will contains the self-proving affidavit signed by Willard McCue and the same witnesses (Respondents, Appendix, Page 10).

The state trial court found clear and convincing evidence that the will was duly executed in accordance with Minn. Stat. § 524.2-502. Petitioner's Appendix at Page 17 (order dated 12/12/91, ¶ 1); Pages 10 and 11 (order dated 11/12/91, ¶ 18). In addition, the trial court held that the will was a self-proved will according to Minn. Stat. § 524.3-406(b). *Id.*; Petitioner's Appendix at Page 8 (order dated 11/12/91, ¶¶ 7 and 8). The Minnesota Court of Appeals affirmed the trial court and stated that "the trial

court's factual determination that the will was duly executed is supported by the evidence." Petitioner's Appendix at Page 3 (order dated 07/22/92, ¶ 1).

SUMMARY OF ARGUMENT

The petition for a writ of certiorari is frivolous and fails to demonstrate that the Minnesota Court of Appeals' decision has directly infringed upon Petitioner's constitutional rights. A trial was held on the execution of Willard McCue's will, and the trial court found that it was duly executed. Petitioner's due process claim and First Amendment claim, raised here for the first time, are without merit.

ARGUMENT

I. Petitioner has no standing because he has failed to show that the Minnesota Court of Appeals' decision has directly infringed upon his constitutional rights.

It is well established that before a person can challenge the constitutionality of legislation, he must show that his constitutional rights would be directly infringed by the enforcement of the legislation. "Litigants may challenge the constitutionality of a statute only insofar as it affects them." *Fleming v. Rhodes,* 331 U.S. 100, 104, 91 L.Ed. 1368, 67 S.Ct. 1140 (1947). "In the absence of a showing of injury, actual or threatened, there can be no constitutional argument." *Anderson National Bank v. Luckett,* 321 U.S. 233, 242, 88 L.Ed. 692, 64 S.Ct. 599 (1944). The

"controlling question" is whether the Petitioner has sustained or is immediately in danger of sustaining some direct injury as a result of the enforcement of the legislation. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 283, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961).

This court also established long ago that it has no jurisdiction to review abstract questions of law where there is no real and substantial controversy between the parties to the record. *Little v. Bowers*, 134 U.S. 547, 33 L.Ed. 1016, 10 S.Ct. 620 (1890).

The Petitioner has shown no direct injury. Neither the self-proved will statute nor the court order restricting use of the court's opinion has been enforced by the Minnesota Courts so as to directly infringe upon the Petitioner's constitutional rights.

Even if Minnesota's self-proved will statute, Minn. Stat. § 524.3-406(b), was constitutionally infirm, the decisions of the trial court and Minnesota Court of Appeals would not be changed in any material way. The decision to probate the McCue will would stand because the trial court found that the will was duly executed pursuant to Minn. Stat. § 524.2-502 based upon the evidence presented at trial. This separate factual finding stands without the aid of the conclusive presumption contained in the self-proved will statute.

On the First Amendment claim, the Petitioner has not demonstrated that his freedom of speech will be restricted in any way by the court order. The order states that "this order opinion will not be published and shall not be cited as precedent."

The restriction against official publication only restricts the court's own use of its opinion, and does not affect the Petitioner's First Amendment rights.

As to the restraint on citing the opinion as precedent, the Petitioner has not demonstrated that he has any need to cite the opinion as precedent, nor has he shown that he has even made any attempt to cite the opinion in such a manner that would be restricted by the order. In addition, the Petitioner overlooked Minn. Stat. § 480A.08 which permits a party to cite an unpublished opinion provided that the party gives all other counsel a copy of the unpublished opinion at least 48 hours before its use.

The case relied upon by the Petitioner, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 49 L.Ed.2d 683, 96 S.Ct. 2791 (1976), involved a judicial order prohibiting everyone in attendance at judicial proceedings relating to a murder case from publishing or broadcasting accounts of confessions or admissions. This court held that the order violated the First Amendment's guarantee of free press.

Petitioner is under no immediate threat of infringement of his First Amendment rights as were the media in *Nebraska Press Ass'n*.

II. Petitioner's constitutional claims were never raised, preserved, or passed upon in the lower courts.

Petitioner raises his Fourteenth Amendment due process claim and First Amendment claim for the first time in his petition for a writ of certiorari and, therefore, his petition should be denied.

A review by this court on a writ of certiorari is discretionary, and this court long ago "established that the court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana,* 394 U.S. 437, 438, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969). In *Cardinale,* this court dismissed the writ which was improvidently granted when the court learned during oral argument that the federal question before the court had never been raised, preserved, or passed upon in the state courts below.

> And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. 394 U.S. at 439.

III. The application of Minnesota's self-proved will statute does not conflict with decisions of other courts, and does not present an important question of unsettled federal law.

The Petitioner has cited no cases where any state's self-proved will statute has been challenged on constitutional grounds. There is no conflict among the courts relating to the constitutionality of self-proved will statutes, and this case does not present an important question of unsettled federal law. For these reasons, the petition should be denied. Supreme Court Rule 10.1.

The unconstitutional inheritance tax statutes and residency statute discussed in Petitioner's brief are different kinds of statutes and they do not draw into question the constitutionality of Minnesota's self-proved will statute.

See *Schlesinger, et al. Executors v. Wisconsin, et al.*, 270 U.S. 230, 70 L.Ed. 556, 46 S.Ct. 260 (1926); *Heiner v. Donnan*, 285 U.S. 312, 76 L.Ed. 772, 52 S.Ct. 358 (1932); *Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed.2d 63, 93 S.Ct. 2230 (1973).

The statutes in these cases contained conclusive presumptions which were contrary to the actual facts in those cases, and could not be overcome by evidence. For example, in *Schlesinger*, a Wisconsin inheritance tax statute conclusively established that gifts made within six years prior to death are "made in contemplation of death." This conclusive presumption was contrary to the findings of a Milwaukee County Court that the decedent, Schlesinger, had made gifts to his wife and three children within six years prior to his death and that none of these gifts were made in contemplation of death. This court held that the Wisconsin statute violated the Fourteenth Amendment because it was arbitrary and had no regard to actualities. 270 U.S. at 240.

The other United States Supreme Court cases cited by Petitioner, *Heiner, Vlandis, Bell v. Burson*, 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586 (1972); *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972), all involved similarly arbitrary statutes containing conclusive presumptions that were contrary to the actual facts of the case and which could not be overcome by evidence.

As the case law indicates, a self-proved will is identified in a two-step process. First, there must be an attested will which means it is signed by the testator and also signed by witnesses who attest that they observed the testator sign or acknowledge his signature in their presence. Second, the will becomes self-proved when the

testator and witnesses sign an attached affidavit reciting that the will was properly signed and executed.

The disputed presumption in Minnesota's self-proved will operates as an aid, not a hindrance to the fact finder. The presumption operates only after factual prerequisites are met. The signature requirements for execution of a will are conclusively presumed only after the proponent files the duly attested will along with the self-proving acknowledgment and affidavits attached to the will. Moreover, the opponent of the will can overcome the presumption with proof of fraud or forgery affecting the acknowledgment or affidavit.

The signature requirements for the Willard McCue will were conclusively presumed because the attested will and acknowledgment and affidavit were filed and Petitioner failed to prove fraud or forgery affecting the acknowledgment or affidavit. Moreover, unlike the cases cited by Petitioner, the Petitioner was allowed to present evidence on all relevant issues at trial.

The state cases cited by the Petitioner are distinguishable; none of them raise federal questions. Three of the cases involved wills that did not comply with the self-proved will statute because they lacked witness attestation. See *Matter of Estate of Sample,* 572 P.2d 1232 (Mont. 1977); *In Re Estate of Ricketts,* 773 P.2d 93 (Wash. App. 1989); *Boren v. Boren,* 402 S.W.2d 728 (Tex. 1966).

Petitioner also cites the case *of Matter of Estate of McGurrin,* 743 P.2d 994 (Idaho App. 1987), which is distinguishable because the testator did not sign or acknowledge his signature in the presence of the witnesses. He

telephoned them after he signed the will. This case did not involve a self-proving affidavit.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KEVIN M. CONNELLY
BAILEY W. BLETHEN
Attorneys for Respondent

APPENDIX

This Appendix includes a copy of the Last Will and Testament of Willard S. McCue.

Last Will and Testament

of

WILLARD S. McCUE

I, WILLARD S. McCUE, of Faribault County, Minnesota, revoke any prior Wills and Codicils, and make this my Will.

ARTICLE ONE
PAYMENT OF EXPENSES AND TAXES

1. My personal representative shall make payments from my estate as follows:

1.1 My personal representative shall pay from the residue of my estate the expenses of my last illness and funeral, valid debts, expenses of administering my estate, including non-probate assets.

1.2 My personal representative shall also pay any estate or other death taxes including any interest and penalties; provided, however, that my said personal representative shall not be responsible for the payment of any additional taxes imposed upon the assets of my estate by virtue of the operation of Section 2032A of the Internal Revenue Code, as amended.

1.3 All estate or other death taxes, including any interest and penalties, which are payable with respect to the property comprising my estate for tax purposes, whether or not such

property passes under this Will, shall be equitably apportioned among those persons interested in my estate to whom such property is or may be transferred or to whom any benefit accrues. Such apportionment shall be made in the proportion that the value of the property, interest, or benefit of such person bears to the total value of the property, interests, and benefits received by all such persons interested in the estate. In making such allocation, allowances shall be made for any exemptions granted by the act imposing the tax, and for any deductions allowed by such act for the purpose of arriving at the value of any specific asset and the net taxable estate. For instance, agricultural real estate which is valued at "special use value" pursuant to IRC Section 2032A in computing my net taxable estate shall also be valued at the "special use value" for purposes of apportionment of estate taxes hereunder.

So far as practicable, my personal representative shall deduct the amount of such taxes allocable to each beneficiary from the amount distributable to such beneficiary, and shall recover from all others for the benefit of my estate their allocable share of such taxes. I hereby authorize and direct my person [sic] representative to

/s/ Willard S. McCue
Willard S. McCue

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take such action as may be necessary to collect such taxes and charges from the beneficiaries

responsible therefor, including, if necessary, encumbering specifically devised property with a mortgage loan, the proceeds of which would be used to pay the beneficiary's share of such taxes before distributing such property, whether specifically devised hereunder or devised as part of the residue of my estate, to such beneficiary subject to any such mortgage lien.

ARTICLE TWO
SPECIFIC GIFTS

2. I give the following:

2.1 My tangible personal property to the extent provided therein, in accordance with any written list, signed by me and dated, and otherwise prepared in accordance with the provisions of Minnesota Statutes, Section 524.2-513. The most recent written list shall control if there are inconsistent dispositions. I give all tangible personal property not disposed of by the provisions of any such written list is equal shares to my sons, JOHN F. McCUE and MARK P. McCUE.

2.2 To my son, JOHN F. McCUE, if he survives me, the sum of Five Thousand and 00/100 Dollars ($5,000.00).

2.3 To each child of my son, JOHN F. McCUE, who survives me, the sum of One Thousand and 00/100 Dollars ($1,00.00 [sic]).

2.4 To MATER DOLOROSA CATHOLIC CHURCH of Delavan, Minnesota, the sum of Two Thousand and 00/100 Dollars ($2,000.00).

2.5 Agricultural real estate owned by me at the time of my death, as follows:

2.5.1 To my son, MARK P. McCUE, if he survives me, agricultural real estate legally described as the North One-half of the Northwest Quarter (N 1/2 NW 1/4) of Section 14, Township 103 North, Range 27 West (consisting of 80 acres more or less), and the Southeast Quarter of the Southeast Quarter (SE 1/4 SE 1/4) of Section 12, Township 103 North, Range 27 West (consisting of 40 acres more or less), all in Faribault County, Minnesota. If my son, MARK P. McCUE, does not survive me, then this devise shall be in favor of my son, JOHN F. McCUE.

2.5.2 To my son, MARK P. McCUE, if he survives me, agricultural real estate legally described as the Northwest Quarter (NW 1/4) of Section 11, Township 103 North, Range 27 West, Faribault County, Minnesota (consisting of 160 acres more or less), including my residential dwelling, farm buildings, and all furnishings, appliances, furniture, household equipment, tools, power mower, etc., situated therein at the time of my death. If my son, MARK P. McCUE, does not survive me, then this devise shall be in favor of my son, JOHN F. McCUE. It is my wish, but

/s/ Willard S. McCue
Willard S. McCue

Last Will and Testament of
WILLARD S. McCUE
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not an express condition of this devise, that as long as either MARK or JOHN continues

to own the residence thereon, he make it available to my daughter, SISTER MARILYN MARIE, S.S.N.D. (MARILYN McCUE), as her home for holiday and vacation visits.

2.6 To my son, MARK P. McCUE, as trustee of a trust to be known as the "MARILYN McCUE TRUST", the sum of Twenty Thousand and 00/1000 [sic] Dollars ($20,000.00). I direct my trustee to pay to or apply directly for the benefit of my daughter, SISTER MARILYN MARIE, S.S.N.D. (MARILYN McCUE), such sums from the net income and principal of such trust as the trustee deems necessary or advisable to provide her with funds for travel, education, and such other items for her personal use as she is permitted to have and keep. Further, the trustee may pay from principal or income such amounts for medical purposes as may be required to take care of medical needs of my daughter. Upon her death, any balance of principal or undistributed income then remaining in this trust shall be distributed in equal shares to my sons, JOHN F. McCUE and MARK P. McCUE, or if deceased to their descendants per stirpes. My son, as trustee, shall have all the powers now specified in the Minnesota Trustee's Powers Act, Minnesota Statutes, Section 501.66, which is hereby incorporated herein by reference. If MARK P. McCUE is unable or unwilling to serve as trustee, then I nominate my son, JOHN F. McCUE, as alternate or successor trustee hereunder.

ARTICLE THREE
RESIDUE

3. I give the residue of my estate, consisting of all property which I can dispose of by Will and not effectively disposed of by the preceding articles of this Will, including any growing crops on my land at the time of my death, to my son, MARK P. McCUE, if he survives me. If my son, MARK P. McCUE, does not survive me, then this devise shall be in favor of my son, JOHN F. McCUE.

ARTICLE FOUR
PERSONAL REPRESENTATIVE

4. I nominate my son, MARK P. McCUE, as my personal representative.

4.1 My said son shall have the power to nominate any additional or successor personal representative.

4.2 If my said son fails or ceases to so act and does not designate a successor, I nominate my son, JOHN F. McCUE, as my personal representative.

4.3 No bond shall be required of any personal representative nominated by me.

4.4 My personal representative, in addition to all other powers conferred upon him by law that are not inconsistent with those contained herein, shall have the power, exercisable without authorization of any court:

/s/ Willard S. McCue
Willard S. McCue

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4.4.1 To sell at private or public sale, to retain, to lease, and to mortgage or pledge for the purpose of borrowing money, any or all of the real or personal property of my estate;

4.4.2 To make partial distributions from my estate from time to time and to distribute the residue of my estate in cash or in kind or partly in each, and for this purpose to determine the value of property distributed in kind;

4.4.3 To settle or to litigate claims in favor of or against my estate;

4.4.4 To exercise or not exercise any election or option granted my personal representative by the Internal Revenue Code or the tax statutes of any state without compensation to any devisee.

4.4.5 To continue in the same form any unincorporated business or venture in which I was engaged at the time of my death, for such period as my personal representative deems necessary or advisable, or to incorporate such business and continue its operation in corporate form whether or not any probable distributee of such business objects to such incorporation or retention in my estate.

ARTICLE FIVE
GENERAL GOVERNING PROVISIONS

5. The following provisions shall apply to the interpretation of my Will and the administration of my estate.

5.1 "Descendants" means all persons who are lineal descendants of the person whose descendants are referred to (including legally adopted lineal descendants) except illegitimate descendants and their descendants; "child" means a descendant of the first generation; "per stirpes" means in equal shares among living children of the person whose descendants are referred to and the descendants (taken collectively) of each deceased child of such person, with such descendants taking by right of representation of such deceased child.

5.2 I hereby express that it is not by inadvertence or oversight that I have not made gifts or devises to my son, PAUL D. McCUE. It is my opinion that considering the gifts, sales, and other provisions which I and my late wife, VIOLET M. McCUE, made to PAUL during our lifetimes, that he has been fairly treated.

5.3 The rules of law and statutes of the State of Minnesota, insofar as legally possible, except as altered by this Will, shall govern in all respects the meaning and legal effect of this will and the administration of my estate. Except as I have otherwise provided, all references to applicable law and Minnesota Statutes mean those enforce and effect on the date of my death and shall include any amendments and successor provisions thereto.

/s/ Willard S. McCue
Willard S. McCue

Last Will and Testament of
WILLARD S. McCUE
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5.4 Captions are for convenience only and are not intended to alter any of the provisions of this instrument.

5.5 Where appropriate, the masculine includes the feminine, the singular includes the plural, and vice versa.

5.6 I direct unsupervised administration of my estate and that my estate be administered in as informal a manner as my personal representative deems advisable and applicable law permits.

In Witness Whereof, I have hereunto set my hand to this my Last Will consisting of five (5) typewritten pages, including this page, on this 10 day of April, 1986.

/s/ Willard S. McCue
Willard S. McCue

We certify that in our presence on the date appearing above in the State of Minnesota, WILLARD S. McCUE signed the foregoing instrument and acknowledged it to be his Will, that at his request and in his presence and in the presence of each other, we have signed our names below as witnesses, and that we believe him to be of sound mind and memory.

/s/ Jane Schaefer residing at Cold Spring, Mn
/s/ Arlene Athmann residing at Cold Spring, Mn

Last Will and Testament of
WILLARD S. McCUE
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STATE OF MINNESOTA

COUNTY OF Stearns

We, WILLARD S. McCUE, /s/ Jane Schaefer, and /s/ Arlene Athmann the testator and the witnesses, respectively, whose names are signed to the attached instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his Last Will and that he had signed willingly, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the Will as witnesses and that to the best of their knowledge the testator was at the time 18 or more years of age, of sound mind and under no constraint or undue influence.

/s/ Willard S. McCue
Willard S. McCue
/s/ Jane Schaefer
/s/ Arlene Athmann

Subscribed, sworn to, and acknowledged before me by WILLARD S. McCUE, the testator, and subscribed and sworn to before me by /s/ Jane Schaefer and /s/ Arlene Athmann, witnesses, this 10 day of April, 1986.

/s/ Jane Welle
Notary Public

[SEAL]
JANE D. WELLE
NOTARY PUBLIC – MINNESOTA
STEARNS COUNTY
My Commission Expires October 1, 1987

GIFTS OF PERSONAL PROPERTY

I, WILLARD S. McCUE, hereby prepare the following list pursuant to Minnesota Statutes, Section 524.2-513, to direct disposition of certain of my items of tangible personal property in lieu of making specific testamentary disposition thereof.

	Description of Item	Name and Address of Beneficiary
1.	Large diamond ring	Mark P. McCue, Chicago, IL
2.	Holmes & Edwards Silverware	John F. McCue, Chicago, IL
3.	Grand Baroque Silverware	Mark P. McCue, Chicago, IL
4.	China dishes (wedding set)	John F. McCue, Chicago, IL
5.	Dishes, Crystal water goblets, television set	Mark P. McCue, Chicago, IL
6.	1983 Cadillac automobile (or replacement auto owned at my death)	Mark P. McCue, Chicago, IL
7.	1982 Cadillac Coupe d'Ville (or replacement auto owned at my death)	Mark P. McCue, Chicago, IL
8.	Gold Acutron watch and band	Mark P. McCue, Chicago, IL

Executed by me this 11 day of March, 1983.

/s/ Willard S. McCue
Willard S. McCue